No. 18,675

United States Court of Appeals

For the Ninth Circuit

American Casualty Company of Reading, Pennsylvania, and General Reinsurance Corporation,

Appellants,

vs.

Idaho First National Bank, Executor of the Estate of V. A. Roberts, Deceased, and Ellen M. Roberts,

Appellees.

APPELLANTS' OPENING BRIEF

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STATEMENT RE JURISDICTION (Rule 18(b) 9th Cir.)

Pleadings and admissions in this case, as established by Pre-Trial Order, establish jurisdiction in the United States District Court for the District of Idaho, Southern Division, pursuant to 28 U.S.C.A. 1322 (Tr. pages 4-5, 30-32), as follows:

A. *Diversity of Citizenship.*

Plaintiffs: American Casualty Company organized and having its principal place of business in the State of Pennsylvania.

General Reinsurance Corporation, organized and having its principal place of business in the State of New York.

Defendants: V. A. Roberts, citizen of the State of Idaho.

Ellen M. Roberts, citizen of the State of Idaho.

V. O. Stringfellow, citizen of the State of Washington, filing general appearance in this action.

Burl A. Johnson, citizen of the State of Oklahoma, filing general appearance in this action.

Darleen M. Johnson, citizen of the State of Oklahoma, filing general appearance in this action.

B. *Amount in controversy,* exclusive of interest and costs, exceeds $10,000.00.

Service was not made upon named defendants, K. H. Vitt or Catherine Vitt and judgment has not been rendered against them.

C. *Appeal:* This appeal is from final judgment of the United States District Court for the District of Idaho, Southern Division (Tr. pages 92-96), and is appealable pursuant to the provisions of 28 U.S.C.A. 1291.

STATEMENT OF CASE

By this action the American Casualty Company sought a judgment for a sum which has been stipulated to have been necessarily and reasonably paid by it in the performance of its bonds, to-wit: $1,049,-218.63. (Tr., pp. 60, 61.)

The Court below determined that the amount of plaintiffs' loss was, as stipulated, $1,049,218.63, and that plaintiffs were entitled as a matter of law to that amount less setoffs consisting of $350,000.00, the agreed value of certain Vitt pledged assets, and an additional $30,000.00, the value of construction equipment at the Amarillo construction site at the date the joint control agreement was entered into to complete the Amarillo project. (Tr., pp. 74, 76.) The Court also determined that plaintiff American Casualty Company and General Reinsurance Corporation were entitled to interest from the date of the District Court's judgment. (Tr., p. 77.)

The Court below affirmed judgments against Burl A. Johnson, Darleen M. Johnson and V. O. Stringfellow for the full amount of the loss in favor of American Casualty and General Reinsurance Corporation. The Court also granted judgment in favor of the Roberts against the Johnsons and Stringfellow in the amount of $669,218.63, plus $15,000.00 attorney's fees, together with interest thereon.

The questions presented by this appeal are in essence, whether trial Court erred in holding that the Vitt pledge valued at $350,000.00, should be set off against amounts otherwise due American Casualty

from defendant appellees and whether the judge erred as a matter of law in computing interest from the date of judgment below instead of at an earlier date, no later than April 1, 1960, when the complaint was filed by American Casualty and General Reinsurance Corporation against the Roberts.

During the litigation V. A. Roberts died and the Idaho First National Bank, executor of his estate, was substituted as defendant. (Tr., pp. 62, 63.)

We will summarize this transaction more or less chronologically. V. O. Stringfellow, K. H. Vitt and Burl A. Johnson formed a joint venture called Stringfellow Amarillo Associates for the purpose of bidding upon a Capehart housing project to be erected for the Department of the Air Force of the United States at Amarillo Air Force Base. (Exhibit 1-A.) The project was divided into three contracts which are numbered and designated in the pre-trial order. (Tr., pages 31, 68; Exhibit 1-C.) The total contract price pursuant to this bid was $7,757,738.00. The joint venture was required under the conditions and specifications of the Air Force to obtain 100% performance and payment bonds and sought such bonds from American Casualty Company.

American Casualty Company required the joint venture to furnish, in addition to personal indemnity by the joint venturers, independent indemnity by some third party guaranteeing that American Casualty Company and its re-insurers and/or co-sureties would be saved harmless from any liability, losses, expenses, judgments, etc., should such bonds be issued as requested.

The joint venturers solicited the defendants, V. A. Roberts and Ellen M. Roberts, to provide such indemnity (Tr., pp. 68, 69), said Roberts having previously provided indemnity on other projects for a fee. (Cromwell Dep., pp. 5, 41.)

On August 28, 1958, Mr. Cromwell as attorney for the Roberts drafted a letter which was signed by Mr. Roberts (Exhibit 3), advising American Casualty Company that he would indemnify it upon the proposed payment and performance bonds to be issued in the aggregate approximate amount of $7,700,000.00 and would execute an indemnity agreement on the terms identical to the terms of the indemnity agreement entered January 18, 1957, for the Fort Huachuca Capehart Housing Project. (Cromwell Dep., p. 5; Plaintiff's Exhibit 3.) The Fort Huachuca Capehart Project referred to in Mr. Roberts' letter was a construction project under the Capehart Act in which General Insurance Company of America was the surety and Roberts the paid independent indemnitor. (Cromwell Dep., p. 5.) With the letter Roberts submitted his financial statement to American showing assets in excess of $2,500,000.00. (Exhibit 4.) The letter and financial statement were forwarded by the Roberts for the purpose of inducing American to execute surety bonds for the joint venturers. The joint venturers in turn agreed to certain conditions by telegram to V. A. Roberts. (Tr., p. 69.)

Thereafter Mr. Cromwell prepared an indemnity agreement (Exhibit 1) upon the instructions of Roberts, making some changes from the Fort Huachuca

agreement among which was a more definite manner in which the Roberts would receive their compensation for executing this agreement. The Roberts' compensation was 1% of the principal amount of the bonds and the indemnity agreement was changed so that in the Amarillo contract the Roberts would be paid monthly and would not have to wait until the completion of the job. (Cromwell Dep., pp. 6, 7.) The Roberts were fully paid all of the compensation due them under this agreement (Tr., pp. 36, 71), even though American Casualty had to finance the joint venturers well before the job was completed, spending in excess of a million dollars to complete the job.

There was attached to and made a part of the indemnity agreement (Plaintiff's Exhibit 1) a copy of the joint venture agreement, powers of attorney issued by the joint venturers, the letter of acceptance of the bid of Stringfellow Amarillo Associates by the Department of the Air Force, the housing contract between the joint venturers and the Department of the Air Force and applications of the joint venturers for bonds.

The validity of this indemnity agreement was admitted in defendants Roberts' answer. (Tr., pp. 9, 23.)

American Casualty having issued the bonds pursuant to the application and representations and agreements of defendants Roberts and the contracts having been executed, the joint venturers proceeded with the construction of the Capehart housing project at Amarillo Air Force Base.

On or about September 23, 1959, the joint venturers notified American that they would be unable to complete said contract without financial assistance. (Tr., p. 71.) American Casualty, through W. H. Bennett, immediately thereafter on September 24 notified defendants V. A. Roberts and Ellen M. Roberts (Tr., p. 71) by separately addressed registered letters to each of them (Exhibits 5 and 6) of the anticipated default and called upon them to take whatever steps were necessary in the performance of their indemnity agreement to save American harmless. Roberts, upon receipt of this notice, sent his attorney Cromwell and an engineer, Paul Wise, to Amarillo to investigate the project. Wise and Cromwell met with Bennett at Amarillo. (Tr., p. 72.) Several days were spent there. (Bennett Dep., pp. 4, 5; Cromwell Dep., pp. 10, 11 and 12.) Wise examined the project and estimated the shortages and losses in excess of a million dollars and conveyed this information to Mr. Roberts (Wise Dep., p. 4.) While at Amarillo Mr. Bennett, representing plaintiff American Casualty, asked Mr. Cromwell if Mr. Roberts would provide the financial requirements of the joint venturers or take over the job, and was advised by Cromwell that Roberts would not and could not perform his obligations under the indemnity agreement. (Cromwell Dep., p. 13.)

Thereafter, Mr. Wise, Mr. Cromwell, Mr. Bennett and Mr. Vitt came to Boise and met with Mr. Roberts at his home. At that time Mr. Bennett again asked Mr. Roberts what he intended to do relative

to saving American Casualty harmless from liability and about providing money for the project. Discussion was had concerning Mr. Roberts' holdings of Morrison-Knudsen Company capital stock and the effect of the liquidation of this stock, as well as other matters. The Roberts refused to take any action or do anything in the performance of their obligations. (Cromwell Dep., p. 17; Wise Dep., p. 11; Bennett Dep., pp. 14, 15, 18 and 49.)

Subsequent to this time American further contacted Roberts requesting him to obtain or guarantee a bank loan to provide funds to the joint venturers to complete the Amarillo project and pay bills, but Roberts refused to do so. (Cromwell Dep., pp. 23, 24; Bennett Dep., pp. 55, 56.)

Subsequent to the execution of the Amarillo bonds, American had provided other surety bonds for these joint venturers and other parties for a Capehart housing project for the Department of the Navy at Whidbey Island, Washington, and this job was also under construction. Upon Roberts' refusal to proceed in any respect under his indemnity agreement on the Amarillo matter, American obtained agreements for the joint control of the Amarillo project and the Whidbey Island project. (Plaintiff's Exhibit 7; Defendants' Exhibit 8.) Pursuant to the joint control agreement, American then provided the moneys necessary for the joint venturers to pay the bills and complete the Amarillo project. (Tr., p. 72.) The sum of money provided by American has been admitted to be the sum set forth in the pre-trial order (Tr., pp. 60-

61, 74), $1,049,218.63, and was the sum for which judgment was sought against the Roberts. Plaintiff did not "take over the job" but financed it to completion under the original contracts.

On or about October 10, 1959, American Casualty entered into a pledge agreement with K. H. Vitt, Catherine Vitt and the Vitt Construction Company, Inc., whereby the Vitts and Vitt Construction Company, Inc. pledged assets of a value agreed to be $350,000.00 to American Casualty. (Tr., p. 73.)

By the terms of the agreement, the Vitts specifically provided that the assets were to be applied first against any losses arising at Whidbey, sustained by American Casualty, and thereafter to any losses sustained in connection with the Amarillo housing project. (Exhibit 9, p. 2.)

This pledge of assets was made at approximately the same time that American Casualty entered into the joint control agreements for Whidbey Island project and the Amarillo project. (Tr., p. 73.)

The joint control agreement with Vitts' pledge agreement were submitted to Roberts' attorneys, J. F. Cromwell and E. H. Anderson, who approved the joint control agreements but made reservations as to the pledge agreement. (Cromwell Dep., p. 25; Bennett Dep., pp. 57, 58; Defendants' Exhibit 10.)

Roberts took no part and evidenced no interest in the Amarillo project except to see that his compensation was fully paid, apparently as per the schedule

set forth in the indemnity agreement, final payments having become due after his refusal to perform under the indemnity agreement. American proceeded to provide finance for said joint venture under the joint control agreement to permit completion of the Amarillo project and was subsequently called upon to provide funds for the Whidbey Island project, which sustained losses in excess of $600,000.00. (Bennett Dep., p. 59.)

Having become liable for and having sustained losses pursuant to the bonds upon which it was indemnified by the defendants, American thereupon brought this action on the 1st day of April, 1960, to seek relief as provided in such indemnity agreement.

In order to avoid the long and protracted trial which would have been necessary for identification of the many invoices, vouchers and drafts involved in the completion of the project and payments of the bills of indebtedness, counsel for both parties stipulated the amount which American necessarily and reasonably expended in the performance of its obligations under such surety bonds, to-wit: $1,049,218.63.

The trial Court determined that the Idaho First National Bank, N.A., as executor of the estate of V. A. Roberts, was indebted to American Casualty in the amount of $1,049,218.63, but that defendant was entitled to have the Vitt pledged assets valued at $350,000.00 set off against this indebtedness, as well as the value of certain construction equipment, amounting to $30,000.00.

American Casualty has not appealed the $30,000.00 setoff, but contends, and one of the questions on this appeal is whether the Court erred in allowing a setoff against the obligations of Roberts of the value of the assets the Vitt and Vitt Construction Company, Inc. pledged to American when such pledge specifically directed that such assets should be applied first to the losses at Whidbey and thereafter the losses at Amarillo.

The trial Court, while finding that defendants Roberts were indebted to American Casualty by virtue of their indemnity agreement in the amount of $669,-218.63, determined that interest on such amount should be computed only from the date of judgment, instead of from the date when such amount was due under the indemnity agreement. (Tr., pp. 76-77.) The question presented is whether, under Idaho law, interest should be computed on the amount found due American Casualty by virtue of the indemnity agreement, from the date when such amounts became due, no later than when complaint was filed, rather than from the date when judgment was entered.

SPECIFICATIONS OF ERRORS

1. The Court erred, as a matter of law, in failing to award plaintiffs-appellants interest on the amount due from defendant-respondent, Idaho First National Bank, N. A., executor of the estate of V. A. Roberts, deceased, from the date and time the same became

due, being not later than the filing of the complaint in this action.

2. The Court erred in concluding, as a matter of law (Conclusion of Law III, Tr., pp. 76, 77), that the date of judgment is the date for the commencement of the accrual of interest in this action for the reason that applicable law establishes that interest was due from the time suit was commenced.

3. The Court erred in concluding, as a matter of law (Conclusion of Law II, Tr., p. 76), that the assets of K. H. Vitt, Catherine Vitt, and Vitt Construction Company, Inc., pledged to American Casualty Company against losses at the Whidbey Island project were applicable to losses sustained at Amarillo and were proper matters of setoff against the amount found owing by defendant-respondents, for the reason that by the law the terms of the pledge agreement control the application of the pledged securities.

4. The Court erred in concluding, as a matter of law (Conclusion of Law II, Tr., p. 76), that plaintiff had a duty to marshal the assets of the principals on said bonds for the benefit of defendant Idaho First National Bank, N. A., as executor of the estate of V. A. Roberts, and Ellen M. Roberts, for the reason that, as a matter of law and the evidence in this case, such doctrine is totally inapplicable to the pledged securities.

5. The Court erred in entering Conclusion of Law III (Tr. pp. 76-77), and crediting as a setoff against the amount owed plaintiffs-appellants by defendant-

respondent, Idaho First National Bank, N. A., executor of the estate of V. A. Roberts, the amount of $350,000.00, and thereby finding that the amount due under and by reason of the indemnity agreement (Exhibit 1) was $669,218.63, for the reason that the correct amount is, pursuant to the evidence and the law, $1,019,218.63, together with interest thereon at 6% per annum from the date the same became due, being no later than the date of filing complaint against defendant.

ARGUMENT

INTEREST IS ALLOWED AT A RATE OF SIX PER CENT ON MONEY DUE ON EXPRESS CONTRACT FROM DATE MONEY BECOMES DUE, WHETHER THE SUM IS LIQUIDATED OR UNLIQUIDATED BY IDAHO STATUTES—COURT ERRED IN NOT ALLOWING APPELLANTS INTEREST FROM TIME MONEY BECAME DUE.

The trial Court allowed the plaintiff interest on the amount of the judgment only from the date of the judgment. (Tr. p. 77, Conclusion of Law No. IV; Tr. p. 93.) This finding is contrary to the laws of the State of Idaho governing the allowance of interest under the class of cases in which this case falls.

The trial Court should have applied the statutes and law of the State of Idaho in allowing interest on the sums due appellants. *Illinois Surety Co. v. John Davis Co.,* 244 U.S. 376, 37 S.Ct. 614, 617, 61 L.ed. 1206; *U. S. v. Mittry Bros. Construction Co.* (D.Ct. Idaho, 1933), 4 F.Supp. 216, 219, affm. 75 F.2d 79.

Section 27-1904, Idaho Code, provides the terms and times when interest may be allowed. This statute provides:

"27-1904. Legal rate of interest.—When there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of six cents on the hundred by the year on:

1. *Money due by express contract.*

2. *Money after the same becomes due.*

3. Money lent.

4. Money due on the judgment of any competent court or tribunal.

5. Money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied.

6. Money due on the settlement of mutual accounts from the date the balance is ascertained.

7. Money due upon open accounts after three months from the date of the last item." (Italics ours.)

The monies due and payable appellants by respondents became expressly due under the terms and provisions of the contract of indemnity between the parties. This agreement was drafted and prepared by respondents' attorney, and any ambiguity or uncertainty should be construed against respondents, if any there be. (Dep. J. F. Cromwell, pp. 3-8.) The applicable provision of this contract provided:

"The third parties [Roberts] hereby undertake and agree to indemnify at all times and keep indemnified the second party [American Casualty], and hold and save second party harmless from and against any and all damages, loss, costs, charges and expenses of whatsoever kind or nature, including counsel fees and attorneys' fees, which the second party shall or may at any time

> sustain or incur by reason or in consequence of having executed said bonds, or any of said bonds; *and the third parties* [*Roberts*] *will pay over,* reimburse and make good to the second party [American Casualty] *all sums or amounts of money which the second party or its representatives shall pay or cause to be paid, or become liable to pay,* on account of the execution of such bonds, or either of such bonds, and on account of any damages, costs, charges, and expenses of whatsoever kind or nature, including counsel and attorneys' fees which the second party may pay, or become liable to pay by reason of the execution of such bonds, or either of such bonds, or in connection with any litigation, investigation or other matters connected therewith, such payment to be made to the second party [American Casualty] as soon as it shall have become liable therefor, whether the second party shall have paid out said sum or any part thereof or not. . . ." (Exhibit 1, pp. 4-5. Italics added.)

Respondents' attorney further specifically provided in the contract the time when liability accrued to respondents and when payment was to have been made, stating:

> "Such payment to be made to the second party [American Casualty] as soon as it shall have become liable therefor, whether the second party shall have paid out said sum or any part thereof or not." (Exhibit 1, p. 5.)

Under the terms of its bond, American Casualty Company became liable to the obligee for completion of the project and payment of claims for labor and

materials when the principals became unable to complete the project and notified appellants of such fact in September, 1959. (Pre-Trial Order, Para. 3(j), Tr. pp. 36-37.) Appellants immediately notified Respondent Roberts of the inability of the principals to perform the contract by registered letter to V. A. Roberts and Ellen M. Roberts (Pre-Trial Order, Para. 3(k), Tr. p. 37; Exhibits 5 and 6.) The liability of appellants was created at that time, as was the liability of respondents under the terms of the contract of indemnity. Respondents knew of the potential loss by reason of the investigation made by their engineer and their attorney, whom they sent to ascertain such fact at Amarillo, Texas, having been advised by their engineer of a probable loss of approximately $1,000,000.00. (Rep. Paul Wise, pp. 4-5.)

Upon respondent's refusal to complete the project and perform the obligations of the indemnitee, appellants proceeded to perform the obligations of the bond by completion of the project and payment of labor and materials. As these items were paid and expenses incurred, the amount of loss was at all times readily ascertainable by mere computation, and, in fact, the total amount that was necessarily and reasonably expended by American in the performance of its obligations was stipulated by the parties in the amount of $1,049,218.63. (Tr. p. 60.) This stipulation was entered into by the parties to avoid the long tedious identification of the very many vouchers, claims and items composing these expenditures, but the amount of the loss was at all times, after said money

had been expended, readily ascertainable, and under the terms of the indemnity agreement, payment was to be made by respondents to appellants as soon as appellants became liable therefor, whether appellants had paid said monies or not. (Exhibit 1, p. 5.)

The Idaho statute allowing interest on monies due has been uniformly construed by the Supreme Court of Idaho to require an award of interest to the party to whom the money was due, computed from the time that it became due. *Hendrix v. Gold Ridge Mines, Inc.,* 56 Idaho 326, 54 P.2d 254, involved the foreclosure of mechanics' liens. There were certain open accounts offset against the amount due under the liens and it was contended that lienholders' claims should not draw interest until after judgment. The Supreme Court of Idaho stated:

> "Sec. 26-1904, supra, [Sec. 27-1904, I.C.] makes no classification of 'liquidated' or 'unliquidated' claims as such. (Donley v. Bailey, 48 Colo. 373, 110 Pac. 65; Trimble v. Kansas City P. & G.R. Co., 180 Mo. 574, 79 S.W. 678, 1 Ann. Cas. 363.) It is dealing with the subject of money due on contracts, either express or implied, and applies as well to unsettled and disputed accounts as to those where the specific sum due is fixed and determined. The only condition is that it shall be a claim arising on a contract express or implied. In such cases the sum due is capable of being made certain by some measure or standard of the contract, whether express or implied."

The present case falls squarely within the class of cases referred to above by the Idaho Court.

Subsequent to the *Hendrix* case, the Court again had the question of allowance of interest before it in *Guyman v. Anderson,* 75 Idaho 294, 271 P.2d 1020, wherein the Court stated the law to be (p. 296, Idaho Reports):

> "This leaves the question of interest. As stated in Hendrix v. Gold Ridge Mines, Inc., 56 Idaho 326; 54 P.2d 254, the statute, Sec. 27-1904, I.C., providing for interest in the absence of express contract, makes no distinction between liquidated and unliquidated claims, and applies to money due on contracts whether express or implied. The general rule is that interest will be allowed even though the claim is unliquidated 'where the amount due can be readily ascertainable by mere computation, or by a legal or recognized standard.' 47 C.J.S., Interest, Sec. 19 b. Here the dispute between the parties involved the rate of pay itself. There was no agreement as to what the rate would be. However, there is some evidence that $10 per hour is a reasonable charge for leveling land with the equipment used by plaintiff, and that such a rate was charged by others. Although scant, this furnishes some proof of a recognized standard for the determination of the amount due. The above rule is, therefore, applicable here and interest at the legal rate should have been allowed from the date the work was completed, to wit: March 23, 1953. State v. Title Guaranty & Surety Co., 27 Idaho 752, 152 P. 189; Donaldson v. Josephson, 71 Idaho 207, 228 P.2d 941; Yarno v. Hedlund Box & Lbr. Co., 135 Wash. 406, 237 P. 1002; Perry v. Magneson, 207 Cal. 617, 279 P. 650; Union Sugar Co. v.

Hollister Estate Co., 3 Cal. 2d 740, 47 P.2d 273; Johnson v. Hanover Fire Ins. Co., 59 Wyo. 120, 137 P.2d 615; Public Market Co. of Portland v. City of Portland, 171 Or. 522, 130 P.2d 624, 138 P.2d 916; U.S. for Use and Benefit of Belmont v. Mittry Bros. Const. Co., D.C., 4 F.Supp. 216."

This staute was further construed by the District Court of Idaho in *U. S. v. Mittry Bros. Const. Co.,* 4 F.Supp. 216, affm. 75 Idaho 79, which case involved claims against the principal and surety for labor and materials arising out of a subcontract. The surety contended that inasmuch as the amount due under the claims was not definite until determined by the Court, interest should not be allowed until after judgment. The matter was carefully considered by Judge Cavanah, United States District Judge, who first ascertained that the law of Idaho controlled even though the suit involved a federal bond under federal law, and then determined that the Idaho statute and cases construing it, required a judgment allowing interest to the claimant upon monies from the time that it was due even though the amounts were in dispute. The Court found that it was difficult to ascertain the exact date upon which the sums became due, and, therefore, held that the latest date upon which interest would have commenced would be the date upon which the complaint was filed. Appellants here contend that although the liability accrued on the part of respondents prior to payment, the latest date when interest would commence to accrue under the Idaho

law would be the time of commencement of suit, to wit: April 1, 1960.

The computation of amounts paid or general liability were readily ascertainable at any time during the completion of this project and payment of claims by mathematical computation, and certainly would not have been nearly as complicated as the problem of determining the reasonable value of services rendered, etc., as was the situation before the Idaho Supreme Court in the cases cited above.

Other Idaho cases have construed the statute as clearly allowing interest on monies in dispute from the time it became due; *Intermountain Association of Credit Men v. Milwaukee Mechanic's Insurance Co.,* 44 Idaho 491, 258 P. 362 (allowing interest sixty days after submission of proof of loss where amounts due, values of property lost, etc., were in issue). *State v. Title Guaranty Co.,* 27 Idaho 752, 152 P. 189 (suit against surety of Bank Commissioner by depositors of bank surety contending its liability had not accrued until determination of amounts due, but judgment allowed interest from date of closing of bank).

Roberts was a paid indemnitor and falls in the same status and under the same obligation as a compensated surety. Respondents' obligations, under the terms of the agreement prepared and executed by them, made their liability and obligation to pay at least co-existent at the time that appellants' liability accrued and payments were made. Of course, the completion and settlement of accounts arising through the inability of the principal to perform its contract took

place over a considerable period, and while it would be mathematically possible to set forth the amount for which appellants were liable or had made payment on any given date by computing the accounts to that date, this, it is admitted, would have been cumbersome, as it was in the *Mittry Bros.* case (supra), and appellants are not insisting upon this minute computation, but are insisting that, as was found by Judge Cavanah in *Mittry Bros.,* the very latest date upon which they would be allowed interest was the commencement of suit, to wit: April 1, 1960.

The Idaho statute and rule is equally applicable to amounts due the indemnitee on a contract of indemnity. Monies are due under these contracts, as specifically provided in this contract, when liability accrues, and in any event, no later than the time when the indemnitee pays the sum for which he is entitled to reimbursement from the indemnitor. *National Bank of Tacoma v. Aetna Casualty & Surety Co.,* 296 P. 831, 161 Wash. 239 (1931); *Kessling v. Frazier,* 119 Ind. 185, 21 N.E. 552; *Prudential Insurance Co. v. Goldsmith,* 192 S.W.2d 1 (repayment of life insurance paid on presumptive death of missing insured absent seven years, interest being allowable under an indemnity agreement executed by the beneficiaries to whom payment had been made from date of discovery that insured was alive.

Under statute similar to the Idaho statute, New York has applied the rule in cases involving indemnity of action tortfeasor by passive tortfeasor on the doctrine of implied indemnity contract, holding that

the plaintiff indemnitee under such contract is entitled to interest from the time indemnitee paid the third party. *Employers Liability Assurance Corp. v. Empire City Iron Works,* 187 N. Y. Supp.2d 425.

To the same effect are *Whetmore v. Green,* 28 Mass. 462; *Panama Canal Co. v. Stockard & Co.,* 137 Atl. 2d 793.

As a matter of law, the appellants are entitled to interest upon such sums as the Court found due appellants from the time the same became due, and certainly no later than the commencement of the suit.

We submit that the finding allowing interest only from time of judgment was in error and that the judgment providing for interest only from the date of judgment is in error and that the judgment should be reversed with directions to the lower Court to allow interest to appellants at the rate of six per cent per annum from April 1, 1960, in accordance with the laws of the State of Idaho.

PLEDGE AGREEMENTS MUST BE ENFORCED AS WRITTEN AND ASSETS PLEDGED TO SECURE ONE OBLIGATION AT THE DIRECTION OF A PLEDGOR MAY NOT BE APPLIED AGAINST A DIFFERENT OBLIGATION.

K. H. Vitt, Catherine Vitt, and Vitt Construction Company, Inc. executed a written pledge agreement (Exhibit 9) pledging assets valued at $350,000.00 to American Casualty on the express and unequivocal condition that such assets must first be applied to losses on the Whidbey Island project and thereafter to losses on the Amarillo project. The clause read:

> "It is understood and agreed that the net proceeds received from any sale of any part or all of the collateral pledged hereunder will be applied first to reimburse surety for any loss attributable to the Department of the Navy project [Whidbey Island], and the balance, if any, shall be applied to reimburse surety for any such loss sustained in connection with the Amarillo Housing Project." (Exhibit 9, p. 2, para. 3.)

American Casualty's losses at Whidbey Island were over $600,000.00 (Bennett Dep., p. 59), and American is entitled to recover this loss from the Vitts and Vitt Construction Company, Inc., as principals on the Whidbey bonds. The Vitt pledge agreement clearly directs that the Vitt assets be applied against these losses at Whidbey, and the Vitts and Vitt Construction Company, Inc. are entitled to have their Whidbey obligations to American reduced to that extent, because the law, as set out below, clearly establishes that a pledgee may not apply pledged securities to any obligation other than the one specifically designated by the pledgor.

The trial Court completely disregarded the unambiguous terms of the pledge agreement and applied the Vitt pledge to the obligation of Roberts allowing the Roberts a setoff in the amount of $350,000.00 against obligations otherwise due American Casualty from the Roberts amounting to $1,049,218.63.

The Vitt pledge agreement was entered into and signed in Washington and the laws of that State control all questions relative to the agreement.

Whitman v. Green, 289 F.2d 566 (9th Cir. 1961); *Roberts v. Underwriters at Lloyds London,* 195 F. Supp. 168, 172 (DC Idaho 1961).

Cases uniformly hold that Courts must give effect to contracts as they are written and that Courts are not free to disregard terms of contracts, or to rewrite or in any way alter a contract voluntarily entered into by the parties. Washington Courts have so held many times.

In *Collins v. Northwest Casualty Co.,* 180 Wash. 347, 39 P.2d 986 (1935), the Court stated:

> "We are not permitted, upon general considerations of abstract justice, or in the application of the rule of liberal construction, to make a contract for the parties that they did not make themselves, or to impose upon one party to a contract an obligation not assumed."

The Washington Supreme Court stated in *Bernard v. Triangle Music Co.,* 1 Wash.2d 41, 95 P.2d 43 (1939):

> "We agree with respondents, at least to this extent, that this is an action to enforce a written contract, and, in the absence of a showing of fraud or other infirmity in its inception, the court must enforce it as written; that *the court cannot disregard or suppress any of its terms;* and, of course, by the same token, it cannot read anything into the instrument which is not already there." (Italics supplied.)

See also, e.g., *Trinity Universal Ins. Co. v. Willrich,* 3 Wash.2d 263, 124 P.2d 950 (1942); *Durant*

v. Snyder, 65 Idaho 678, 688, 151 P.2d 776 (1944); *Toysum v. Toysum,* 82 Idaho 58, 63, 349 P.2d 556 (1960); *Hello World Broadcasting Co. v. International Broadcasting Corp.,* 186 La. 589, 173 S. 115 (1937).

Pledge agreements are no exception and are to be enforced according to their terms, *Swartz v. Avery,* 113 Vermont 175, 31 Atl.2d 916 (1943).

The trial Court erred in refusing to give effect to the pledge contract as written and, in effect, substituted a different contract in its place by applying the pledged assets to Amarillo instead of Whidbey Island, as directed by pledgors in their agreement.

Assets specifically pledged by the pledgor to secure a specific obligation may not be applied against a different obligation. The Eighth Circuit Court of Appeals so held in *State of Arkansas v. Pufakl,* 52 F.2d 116, 118 (1931). The Court stated:

> "Where securities are pledged to secure the payment of a particular loan or debt, the creditor cannot hold such collateral to secure the payment of any other claim or indebtedness than the one for which they were specifically pledged."

See also *Progressive Builders v. Florida Wide Developers,* 142 So.2d 122 (Fla. App. 1962).

The manner in which the Vitt assets were to be applied is controlled by the direction Vitt gave in the pledge agreement:

> "The determination of the legal effect of the pledge is controlled by the intention of the par-

> ties. . . . It will not be extended to a debt or obligation other than that intended by the pledgor." *Parron v. First National Bank,* 289 Mich. 629, 286 N.W. 859, 860, 861 (1939).

The assets have been placed in American Casualty's hand and it is American Casualty's obligation to apply such assets as directed by the pledgors Vitt and Vitt Construction Company, Inc. In *People v. Klinger,* 164 Misc. 530, 300 N.Y. Supp. 408, 417, it is stated:

> "The pledgee cannot lawfully retain the property to secure a debt distinct from that which it was pledged. 49 C.J. 972. See Romero v. Newman, 50 La.Ann. 80, 23 So. 493."

This Ninth Circuit Court, applying Washington law, which is controlling, held that where a receipt specified the obligation which assets are pledged to secure, that receipt is controlling and the assets may not be applied against different obligations. *First National Bank of Kelso, Wash. v. Gruver,* 77 F.2d 144 (1935).

The common law on this matter is summarized at 68 A.L.R., beginning at page 912, citing numerous holdings, as follows:

> "The right of the owner of collateral to direct its application must be expressed at the time the pledge is made, either by an express direction or by a reservation of future right of direction. In the absence of such express direction or reservation of right thereto by the owner, the pledgee may apply the collateral to any debt within the

> pledge that he may deem most precarious, or as his judgment may dictate. Slaughter v. Texas Life Ins. Co. (1920); Tex.Civ.App.) 218 S.W. 1109.
>
> "But, if collateral is pledged for the security of a particular, specified debt, the pledgee has no lien on the collateral pledged for any other or subsequent debt contracted by the pledgor to him, without an agreement to that effect, either express, or implied from the nature or circumstances of the transaction."

There is no evidence in this record to demonstrate that the pledge agreement executed by Vitt Construction Company, Inc., and Mr. and Mrs. Vitt, directing that the pledged security be applied first to Whidbey losses and then to Amarillo losses, was anything other than a completely voluntary act on the part of the Vitts. Such application would have been to the benefit of the Vitt Construction Company, Inc., as it was in no way concerned or liable for the Amarillo losses. There was no fraud or collusion between the Vitts and American Casualty, and none has been alleged by defendant.

The Vitt Construction Company, Inc. is not a party to this action, and jurisdiction was never obtained over the Vitts. The Court's application of the assets contrary to the express terms of the Vitt agreement is not binding upon them. The Court's disregard of the agreement places American in an untenable position. The Court caused the pledged securities to be set off against losses at Amarillo, thus giving Roberts credit which the Vitts are entitled to. American

would be forced to apply the pledged security against Whidbey by the terms of the Vitt agreement. Appellants are thus faced with the necessity of a double application of the pledged securities, once to Roberts by judgment of the Court, and again to Vitt by the terms of the pledge agreement, which agreement was not and could not be reformed in this action by the Court.

The Vitt pledge agreement is a binding agreement that controls the application of the security to the Whidbey losses. The trial judge erred in refusing to give effect to this agreement as written, and consequently, the conclusion of law allowing a setoff of the Vitt pledged security against losses at Amarillo for amounts otherwise due American Casualty from the Roberts should be reversed.

THE EQUITABLE DOCTRINE OF "MARSHALLING ASSETS" IS COMPLETELY INAPPLICABLE TO THE CASE AT BAR.

The trial Court below could not have had the equitable doctrine of marshalling assets in mind when it concluded as a matter of law (Tr., p. 76) "That it was the duty of plaintiffs to marshal the assets of the principals on said bond" for the benefit of Roberts, for the reason that very basic elements necessary to call such doctrine into effect are completely lacking from this case.

The essence of the equitable doctrine of marshalling assets is that when two creditors, i.e., American Casualty and Roberts, are creditors of a single debtor,

i.e., Vitt, and where one creditor is secured by only one fund of assets of the debtor and the other creditor is secured by two funds of assets of the common debtor, the doubly secured senior creditor will be required to satisfy his debts, first out of the funds which are unavailable to the junior creditor, and then out of the fund available to both creditors, so that in the end, assets, if possible, will remain to satisfy the junior creditor's debt.

This general statement of the doctrine is set out at 35 Am. Jur., Marshalling Assets and Securities, Sec. 2, pp. 385-386:

> "Where two or more creditors seek satisfaction out of the assets of their debtor, and one of them can resort to two funds whereas another creditor has recourse to only one fund—for example, where a senior or prior mortgagee has a lien on two parcels of land, and a junior mortgagee has a lien on but one of the parcels—the former may be required to seek satisfaction out of the fund which the latter creditor cannot touch, in order that the latter may, if possible, have his claim satisfied out of the fund which is subject to the claims of both creditors. This mode of procedure is termed 'marshalling assets'. Generally speaking, the doctrine of marshalling requires the assets to be applied so as to protect a creditor who has a lien only on only a part thereof."

See, e.g. *In Re Careful Laundry, Inc. v. Pantex Mfg. Corp.*, 104 A.2d 813 (Md., 1954).

The burden of showing the existence of all conditions calling for marshalling is upon the one who

seeks to be benefited by the doctrine, the Roberts in this case. *Johnson v. Wilson,* 145 Wash. 515, 261 Pac. 102 (1927).

An absolutely vital and essential prerequisite to the applicability of the doctrine is that there be in existence two funds of assets available to one of the creditors. *Muskogee Industrial Financial Corp. v. Perkins,* 361 P.2d 1065 (Okla., 1961); *In Re Concordia Mercantile Co.,* 173 Kan. 155, 244 P.2d 1175 (1952); *Mead v. City National Bank of Clinton,* 232 Iowa 1276, 8 N.W.2d 417 (1943); 55 *C.J.S.,* Marshalling Assets and Securities, Sec. 8, p. 968.

In the case at bar there is only one fund of assets in dispute—mainly the Vitt securities. There is no other fund of assets to which American Casualty can resort to satisfy its Whidbey losses, before resorting to the Vitt assets. The existence of only one fund of security makes the principle of marshalling assets totally inapplicable.

Furthermore, the doctrine is an equitable doctrine and a prerequisite to its application is the requirement that the debtor who is secured by two funds, and whose security is paramount to the junior creditor be made completely whole. The doctrine merely sets forth the manner in which the paramount creditor is to be made whole, mainly that the creditor must resort to funds unavailable to the junior creditor first, thus leaving assets against which both creditors have liens, available to satisfy the junior creditor's debt, if any such assets remain after the primary creditor has been made whole.

At 55 *C.J.S.,* Marshalling Assets and Securities, Sec. 4, pp. 962-963, it is stated:

> "The doctrine of marshaling applies only when it can be applied with justice to the paramount, or doubly secured, creditor, and without prejudicing or injuring him, or trenching on his rights. Such relief will not be given if it will hinder or impose hardships on the paramount creditor, or inconvenience him in the collection of his debt, or deprive him of his rights under his contract, by displacing or impairing a prior acquired lien or contract right; *nor will it be given on any other terms than giving him complete satisfaction.*" (Emphasis added.)

In *Philadelphia Home, etc., v. Philadelphia Savings Fund Society,* 126 N.J.Eq. 104, 8 A.2d 193, 198 (1939), it was stated:

> "One of the rules of this doctrine is that relief will not be given if it will prejudice the rights of the person against whom the doctrine is asserted, which is tantamount to holding that the doctrine will not be asserted unless it may be equitably asserted, in other words that relief will not be given if it will delay or inconvenience the paramount encumbrancer in the collection of his debt or prejudice him in any manner."

See also, *Mead v. City National Bank of Clinton,* 232 Iowa 1276, 8 N.W.2d 417 (1943).

The various rules pertaining to the doctrine of marshalling assets and securities are stated with many cases annotated at 135 *A.L.R.* 738. It is clear that this doctrine does not apply to the application of the Vitt pledge.

In the case at bar there is only one fund against which American Casualty can resort for satisfaction of its losses at Whidbey, but even the application to the Whidbey losses of all the Vitt assets which the Roberts want preserved and applied against their losses, will not make American Casualty whole. Losses to American Casualty at Whidbey presently exceed more than $600,000.00. (Bennett Dep., p. 59.)

If the Court in its reference to "marshalling of assets" referred only to the protection of salvage and the application of a credit for the equipment which the Court found worth $30,000.00 and which the Court credited to Roberts, it was a misuse of terms. Appellant has not appealed from that finding—but misused or not, neither the term nor the doctrine applies to this case in any way and does not justify the complete alteration of the Vitt agreement.

The Court erred in determining that there was a "duty" on the part of American Casualty to "marshal" the Vitt assets for the benefit of Roberts.

AMERICAN CASUALTY OWED THE ROBERTS NO DUTY TO PURSUE COLLATERAL ASSETS FOR THE ROBERTS' BENEFITS ONCE THE ROBERTS' LIABILITY UPON THE INDEMNITY CONTRACT BECAME FIXED WHEN THE CONTRACTORS DEFAULTED ON THE BONDS. IT WAS THE ROBERTS' OBLIGATION TO PURSUE SUCH SECURITY AND REDUCE THEIR LOSSES THEMSELVES, IF THEY SO DESIRED.

Once American Casualty became liable for losses at Amarillo, they immediately became entitled to be saved harmless from the consequences of such liability by the Roberts. By the terms of the indemnity agreement, it was not necessary for American Casualty to pay all claims arising out of the contractors' default at Amarillo. The Roberts' obligation on the indemnity contract arose and became fixed once American Casualty became liable, whether or not American Casualty had made payments. (See Exhibit 1, page 5.)

American Casualty's liability on the bonds accrued upon the contractors' default in September, 1959, and most claims had been paid when suit was filed against the Roberts April 1, 1960. The Roberts' obligation on the indemnity agreement matured at least by that time and their obligation to pay American Casualty became fixed.

Roberts refused to pay or save American harmless when demand was made upon them September 24, 1959, and many times thereafter. The Roberts breached their indemnity agreement as early as September 24, 1959, and thereafter, American, as a matter of law, was under no duty to attempt to secure collateral assets and reduce the Roberts' obligation to American, which the Roberts at all times refused to pay.

The great weight of authority makes it absolutely clear that the indemnitee, American Casualty, was under no duty to reduce the Roberts' losses by pursuing collateral assets for the benefit of the indemnitor, Roberts, once their liability on the indemnity agreement became fixed. It was the Roberts' duty to look after their own interests.

Fidelity & Deposit Company of Maryland v. O'Brien, 222 S.W. 645 (Ky., 1918), was a suit by a surety on a sheriff's bond against surety's indemnitor. The Court held the indemnitee (surety company) was not required to bring suit and reduce the indemnitor's liability, once the indemnitor was liable upon the agreement. The Court stated:

> "(Surety) was not required to resort to any remedies it might have against [sheriff] Blackwell or other persons through him. When it satisfied the judgments it had the right to proceed at once against the indemnitors on their undertaking to save it from loss. . . . In other words, when the indemnitee is sought to be made liable on his undertaking, he must not, by his laches or negligence, put upon the indemnitors a burden they would not otherwise be compelled to bear, but this duty does not go to the extent of obliging the indemnitee to bring suit against his principal or third parties to protect the indemnitors or to take any steps to recover from his principal or third parties the funds for which it has become liable on his undertaking. *It is the business of the indemnitor to resort, for their own protection, to remedies like these if they desire to do so.*" (Emphasis added.)

See also *Fidelity National Bank v. Fox,* 258 P. 355 (Wash.), 1927; LRA 1918E., page 575.

An indemnitee may even abandon security furnished without consequence to his rights as against the indemnitor. *New Amsterdam Casualty Co. v. Frazier,* 252 P. 703 (Wash. 1927).

American Casualty was entitled to recover from the Roberts for all liability and loss sustained on the performance and payment bond covering the Amarillo project. American Casualty was not obligated in any way to pursue collateral assets for the benefit of the Roberts. Once the Roberts' liability on the indemnity contract became fixed, it was their own obligation to look out for themselves.

K. H. Vitt and Vitt Construction Company, Inc. had an absolute right to determine the obligation against which their assets were to be applied. American Casualty was in no way impaired from accepting the pledge to be applied first against the losses at Whidbey, because American Casualty owed the Roberts no duty to secure collateral assets and reduce the Roberts' losses at Amarillo. The Roberts had ample opportunity to obtain this security for themselves. They failed to do so and, in fact, failed to do anything whatever to reduce the loss at Amarillo or to save American Casualty harmless from loss. Trial Court erred, as a matter of law, in allowing a setoff of the amount of the pledged securities against amounts otherwise due American and General Reinsurance.

CONCLUSION

We respectfully submit to the Court that the Court erred in not allowing interest on the amounts found due from defendant from the time the same became due and not later, in the absence of evidence of exact date, than the time of filing the Complaint.

We further submit that under the law the Court was without authority to change the terms and conditions of the pledge made by Vitt Construction Company, Inc. and Mr. and Mrs. Vitt of their shares of stock in the Vitt Construction Company, Inc., and the sum found due by the defendant to the plaintiff should be increased to the extent of the agreed value of such pledged securities, to-wit: $350,000.00.

We therefore submit to the Court that this Court should return this action to the District Court with instructions to enter judgment for the sum of $1,019,-218.63 and to allow plaintiff interest on the sum from April 1, 1960, together with attorneys' fees in the sum of $15,000.00.

Dated, Boise, Idaho,
August 15, 1963.

Respectfully submitted,
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Attorneys for Appellants.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIS C. MOFFATT,
Attorney for Appellants.

(Appendix Follows)

Appendix.

Appendix

TABLE OF EXHIBITS

Exhibit	Identified Pages	Offered Pages	Accepted Pages
Plaintiffs' Exhibit 1, Indemnity agreement, together with all exhibits attached thereto, and numbered A, B, C, D, E, F	31, 36	31, 39	39-40, 68, 69
Plaintiffs' Exhibit 2(a), performance and payment bonds—AIR 3	34	34	39-40, 68
Plaintiffs' Exhibit 2(b), performance and payment bonds—AIR 4	34	34	39-40, 68
Plaintiffs' Exhibit 2(c), performance and payment bonds—AIR 5	34	34	39-40, 68
Defendants' Exhibit 3, letter, Roberts to American Casualty, dated August 28, 1958	35	35	39-40, 69
Plaintiffs' Exhibit 4, Roberts financial statement	35	35	39-40, 69
Plaintiffs' Exhibit 5, letter, American Casualty to V. A. Roberts, dated September 24, 1959	37	37	39-40, 72
Plaintiffs' Exhibit 6, letter, American Casualty to Mrs. V. A. Roberts, dated September 24, 1959	37	37	39-40, 72
Plaintiffs' Exhibit 7, Amarillo joint control agreement	38	38	39-40, 73
Defendants' Exhibit 8, Whidbey Island joint control agreement	38	38	39-40, 73
Defendants' Exhibit 9, Vitt pledge agreement	39	39	39-40, 73
Defendants' Exhibit 10, letter of Eugene Anderson, dated October 14, 1959	39	39	39-40, 74